IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 164 of 2002

with

SPECIAL CIVIL APPLICATION No 3987 of 2001

with

SPECIAL CIVIL APPLICATION Nos 742, 1561, 163, 173, 351, 352, 693, 696, 697, 699, all of 2002

with

SPECIAL CIVIL APPLICATION Nos 2898, 2899, 2900, 2208, 2209, 2602, 2603 & 2604, all of 2001

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR.B.C.PATEL
and
Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAROLIA TEXTILE INDUSTRIES PVT. LTD.
Versus
UNION OF INDIA

Appearance:
MR MIHIR H JOSHI, MR UDAAY JOSHI for M/S.TRIVEDI & GUPTA, MR PM DAVE, MR AP DAVE, for Petitioners in respective petitions

MR DN PATEL & MR MR SHAH for Respondents

CORAM : ACTG. CHIEF JUSTICE MR.B.C.PATEL
and
MR.JUSTICE JAYANT PATEL

Date of decision: 07/03/2002

COMMON ORAL JUDGEMENT

(Per : ACTG.CHIEF JUSTICE MR.B.C.PATEL)

#. This group of petitions raises a common question and therefore, all these matters are being disposed of by this common judgment.

#. The constitutional validity of Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules, 1944"), as substituted by M.F.(D.R.) Notification No.18/99-C.E.(N.T.) dated 28.2.1999, prescribing imposition of penalty equal to an amount of duty outstanding from an independent processor of textile fabrics in case such person fails to pay the amount of duty or any part thereof by the specified date, is challenged, on the ground that the aforesaid Rule, is ultra vires the Constitution.

#. Rule 96ZQ of the Rules, 1944, reads as under:

"96ZQ. Procedure to be followed by the independent processor of textile fabrics --

(1) An independent processor of textile fabrics falling under heading Nos.52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 and 55.14 of the Schedule to Central Excise Tariff Act, 1985 (5 of 1986), shall debit an amount of duty of Rs.1.5 lacs per chamber per month or Rs.2 lacs per chamber per month, as the case may be on the annual capacity of production as determined under a Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998.

(2) The amount of duty payable under sub-rule (1) shall be debited by the independent processor in the account current maintained by him under sub-rule (1) of the rule 173G of the Central excise Rules, 1944.

(3) The amount of duty payable under sub-rule (1) shall be paid, in advance by the 5th of each calendar month.

Provided that the amount of duty payable for the period from 16th December, 1998 to 31st December 1998 shall be deposited on or before the 31st day of December 1998.

(4) The independent processor shall continue to maintain records and file returns pertaining to production, clearance, manufacturing, storage, delivery or disposal of goods, including the materials received for or consumed in, the manufacture of excisable goods or other goods, the goods and materials in stock with him and the duty paid by him as prescribed under the Central Excise Rules, 1944 and the notification issued thereunder.

(5) If an independent processor fails to pay the amount of duty by the date specified in sub-rule (3) he shall be liable to:-

(i) pay the outstanding amount of duty along with interest at the rate of thirty six percent, per annum calculated for the outstanding period on the outstanding amount and

(ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.

(6) If an independent processor removes the processed textile fabrics referred to in sub-rule (1) without complying with the requirements of that sub-rule or sub-rule (2) or sub-rule (3) then all such goods shall be liable to confiscation and the independent processor shall be liable to a penalty equal to an amount not exceeding three times the value of such goods, or rupees five thousand whichever is greater.

(7) Where an independent processor does not produce or manufacture the processed fabrics specified in sub-rule (1) during any continuous period of not less than seven days and wishes to claim abatement under sub-section (3) of section 3A of the Central Excise Act, 1944 (1 of 1944) the abatement will be allowed by an order passed by the Commissioner of Central Excise of such

amount as may be specified in such order, subject to the fulfillment of the following conditions namely:

a. xxx xxx xxx xxx

b. xxx xxx xxx xxx

c. xxx xxx xxx xxx "

#. A plain reading the aforesaid Rule points out that if an independent processor fails to pay the amount of duty by the date specified in sub-rule (3), then he is liable to pay the outstanding amount of duty and the interest as indicated in clause (i) of sub-rule (5) and also liable to pay a penalty as indicated in clause (ii) of sub-rule (5) of Rule 96ZQ of the said Rules.

#. We are not concerned with other sub-rules or sub-clauses of this Rule and therefore, we are not discussing the same. On reading clause (i) of sub-rule (5) of Rule 96ZQ, it appears that 36% interest per annum is imposed as compensatory measure as the Revenue suffers losses on account of non payment of revenue. At the same time, with a view to see that there is deterrent effect on the tax payers, it is also thought fit to impose penalty so that the amount which the Revenue is entitled to collect is paid by an assessee in time and the Government is not required to face any hardship. If the amount is not paid, it becomes difficult for the Government to run the administration. The Government obviously will not be in a position to fulfil its promises and therefore, considering the constitutional mandate, it becomes bounden duty of the tax payers to pay taxes in time. Therefore, this provision is to be invoked when revenue is not paid by an assessee in time. The aforesaid two clauses operate in different fields and it is known that compensatory measures as well as measure for deterrent effect can be provided and we find no difficulty in arriving at a conclusion that it is not possible to provide compensatory measure as well as the measure which would deter the assessees. What is important in the instant case in our view is that there is source of power and therefore the contention raised by the assessee that there is no source cannot be accepted.

#. What is important in the present case is that clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules, provides for penalty. However, in the body of this clause, no guidelines are provided to impose penalty nor there is

anything to indicate that the amount mentioned therein is the minimum or maximum and therefore, the contention raised on behalf of the Revenue is that as per the language found in clause (ii) of sub-rule (5) penalty is required to be imposed and therefore, the assessing officer has rightly imposed penalty.

#. The Apex Court had an occasion to examine similar situation in the case of State of Madhya Pradesh v. Bharat Heavy Electricals reported in 1998(99) E.L.T.33 (SC). The main ground on which challenge was based on behalf of the respondents before the High Court in the that case was that the heavy levy of penalty of ten times the amount of tax was confiscatory in nature and was ultra vires the provisions of the Act and was also violative of Articles 14 and 19 of the Constitution. It was also contended by the respondents that the presumption contained in sub-section (5) of Section 7 of the Act which was regarded as not being rebuttable, was ultra vires as it did not give any discretion to the assessing authority to reduce or waive the penalty on the ground of absence of malafide or any trivial or technical defect. In paragraph-10 of the judgment, the Apex Court pointed out as under:

> "....In our opinion it could not be the intention of the legislature that an accidental omission or non-furnishing of the statement for a good and valid reason must necessarily lead to the presumption that the registered dealer had the intention of facilitating the evasion of entry tax..."

#. Before us, the learned counsel appearing for the Revenue submitted that in view of the mandate as indicated in sub-rule 5 of Rule 96ZQ, the words contained therein, namely, "he shall be liable to" must mean that the penalty must be imposed as indicated in sub-clause (ii) of sub-rule 5 of Rule 96ZQ. It is required to be noted that in the case of State of Madhya Pradesh v. Bharat Heavy Electricals (supra), the Apex Court considered as to whether the words "shall be presumed" occurring in Section 28B were rebuttable or not. The Apex Court referred the decision rendered in the case of Sodhi Transport and anr. etc.etc. v. State of U.P. and anr. etc. etc. reported in (1986) 1 SCR 939, wherein the Apex Court referred to Section 4 of the Indian Evidence Act and observed at page 953 as under:

> "....These words, i.e., "shall presume" are being used in Indian judicial lore for over a century

to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and we should expect that the U.P.Legislature also has used them in the same sense in which Indian courts have understood them over a long period and not as laying down a rule of conclusive proof. In fact these presumptions are not peculiar to the Indian Evidence Act. They are generally used whenever facts are to be ascertained by a judicial process."

#. In our view, there is no reason as to why same analogy should not be applied in the instant case also. The Apex Court in the above decision has also pointed out that the Section should be read as containing a rebuttable presumption and clarifying the position, the Apex Court observed in paragraph-11 as under:

"...This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under sub-sections (1) and (2) of Section 7 was not with the intention to facilitate the evasion of the entry tax. In other words, sub-section (5) of Section 7 places the burden of proof on the registered dealer to show that the non-submission of the statement under sub-sections (1) and (2) of Section 7 was not with a view to facilitate the evasion of entry tax..."

The Apex Court pointed out that, "if a registered dealer is unable to satisfy the authorities in this regard then, in the absence of satisfaction, the presumption is that non-submission of statement has facilitated the evasion of entry tax". It is in view of this that the Apex Court held that the Section does not suffer from any vice and the Section is required to be construed to mean that the presumption contained therein is rebuttable and secondly, the penalty stipulated therein is only the maximum amount which would be levied and the assessing authority has the discretion to levy lesser amount depending upon the facts and circumstances of each case. Construing Section 7(5) in this manner, the Apex Court pointed out that the decision of the High court that Section 7(5) is ultra vires cannot be sustained. Applying this analogy in the instant case also, it is difficult to accept the contention raised by the petitioner that the said Rule is ultra vires. However, at the same time, the authority concerned is

required to read the Rule in the manner indicated above.

#. Mr.Joshi, learned counsel appearing for petitioners in some of these petitions submitted that in view of the decision of the Hon'ble Supreme Court in the case of M/s.Hindustan Steel Ltd. v. The State of Orissa reported in AIR 1970 SC 253, penalty cannot be imposed merely on account of failure. He has relied upon observations made in paragraph-7 of this decision. In this regard, we make it clear that it will be open for the petitioners to point out this judgment to the authority concerned. It is also to be noted that we have not examined the aspect whether any retrospective effect can be given or not to the Notification in question and it will be open for the authority to consider this aspect also.

##. In view of the aforesaid discussion, we direct the assessing officer, i.e. the authority which passed the Order in Original, to reconsider the matters in so far as the penalty is concerned, in the aforesaid background. It goes without saying that the order imposing duty and recovery of interest etc. is not being disturbed by this Court. The petitions are allowed to the aforesaid extent only. Rule is made absolute accordingly in all these petitions. No order as to costs.

(B.C.Patel, Actg.C.J.)

(Jayant Patel, J.)

(sunil)